



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 10, 2015

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2015-25977

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 590055 (ORR #14542).

The Dallas Independent School District (the "district") received a request for four categories of information pertaining to a former named employee of the district. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.135 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹

¹A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. However, we will consider your arguments against disclosure of the submitted information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov’t Code § 552.022(a)(1), (3). We find some of submitted information, which we have marked, consists of information that is subject to sections 552.022(a)(1) and 552.022(a)(3). The district must release the information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. The district must release the information subject to section 552.022(a)(3) unless it is made confidential under the Act or other law. Although you seek to withhold this information under sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information at issue may not be withheld under

these exceptions. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We will also consider your arguments under sections 552.107 and 552.111 for the information not subject to section 552.022. Further, as sections 552.101, 552.102, 552.117, 552.135, 552.137, and 552.147(a-1) of the Government Code can make information confidential under the Act, we will consider their applicability to the submitted information.²

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;

(B) between the client’s lawyer and the lawyer’s representative;

(C) by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s representative, if the communications concern a matter of common interest in the pending action;

(D) between the client’s representatives or between the client and the client’s representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You assert the information subject to section 552.022 reveals and reflects information communicated between attorneys for the district and representatives of the district made in furtherance of legal services rendered to the district. You state the communications at issue were intended to remain confidential and have not been disclosed to non-privileged parties. However, upon review, we find the district has not demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district may not withhold the information subject to section 552.022 under Texas Rule of Evidence 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical

probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You contend the information subject to section 552.022 of the Government Code contains attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated any of the information at issue consists of mental impressions, opinions, conclusion, or legal theories of an attorney or an attorney’s representative that were created for trial or in anticipation of litigation. Accordingly, the district may not withhold any of the information subject to section 552.022 under rule 192.5.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 261.201 of the Family Code, which provides, in part:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see also id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1) (defining “abuse” for purposes of Family Code ch. 261). You contend the submitted information is confidential under section 261.201. We note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). You state the

information was obtained from the Dallas Police Department, the Texas Department of Family and Protective Services, or the district's police department. You also state the district has on staff an employee who is shared with the Texas Department of Family and Protective Services to receive and investigate child abuse claims. Upon review, however, we find you have not established any of the submitted information consists of a report of alleged or suspected child abuse or neglect made under chapter 261 of the Family Code, information used or developed in an investigation under chapter 261, or identifying information of the person who made a report under chapter 261. Therefore, we conclude the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

Section 552.101 of the Government Code also encompasses section 261.101(d) of the Family Code, which provides the identity of an individual making a report under chapter 261 is confidential. *See id.* § 261.101(d). As noted above, the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103. Upon review, we find none of the submitted information contains the identifying information of an individual who made a report under chapter 261 of the Family Code. Thus, the district may not withhold any of the submitted information under section 552.101 in conjunction with section 261.101(d).

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which provides, in relevant part, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). The Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). In Open Records Decision No. 643, we determined for purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code and who is in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4.

We note the information we have marked consists of evaluations of a teacher by the district. We understand the teacher at issue was engaged in the process of teaching at the time of the evaluation. However, the district does not indicate the teacher at issue held a teaching certificate or permit under chapter 21 of the Education Code at the time of the evaluation. *See* ORD 643 at 4. Accordingly, we must rule conditionally. To the extent the teacher at issue held a teaching certificate or permit under chapter 21 of the Education Code, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the teacher at issue did not hold a teaching certificate or permit under chapter 21 of the Education Code,

the information we have marked is not confidential under section 21.355 of the Education Code and may not be withheld on that basis under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information we have marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.³

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. The doctrine of common-law privacy generally protects the

³As our ruling is dispositive, we need not address the district’s remaining arguments against disclosure of this information.

identifying information of juvenile offenders and juvenile victims of abuse or neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code §§ 58.007, 261.201. Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.⁴

The district claims section 552.107 of the Government Code for the remaining information not subject to section 552.022. Section 552.107(1) protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those for rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information at issue reveals and reflects information communicated between attorneys for the district and representatives of the district made in furtherance of legal services rendered to the district. You state the communications at issue were intended to remain confidential and have not been disclosed to non-privileged parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the remaining information. Accordingly, the district may withhold the information we have marked under section 552.107(1) of the Government Code. However, we find the district has not demonstrated the applicability of the attorney-client privilege to the remaining information at issue and may not withhold it on this ground.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” *See* Gov't Code § 552.111. This section encompasses the attorney work-product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland*, 22 S.W.3d at 360; ORD 677 at 4-8. Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

⁴As our ruling is dispositive, we need not address the district's remaining arguments against disclosure of this information.

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. The test for determining whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5. *See Nat'l Tank Co.*, 851 S.W.2d at 207. Upon review, we find you have failed to demonstrate how the remaining information not subject to section 552.022 constitutes material prepared, impressions developed, or a communication made in anticipation of litigation by or for the district. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, the district may not withhold the remaining information under section 552.111 of the Government Code on the basis of the work-product privilege.

Section 552.135 of the Government Code provides, in relevant part, the following:

(a) "Informer" means a student or a former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135(a)-(c). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this

office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not make a report are not informants for purposes of section 552.135 of the Government Code. You state the remaining information identifies students and employees who reported an alleged violation of criminal and civil laws. Upon review, however, we find the district has failed to demonstrate any of the remaining information reveals the identity of an informer for the purposes of section 552.135 of the Government Code. Therefore, the district may not withhold any of the remaining information on that ground.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *Id.* § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the district must withhold the date of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). Gov’t Code §§ 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, “A school district may not require an employee or former employee of the district to choose whether to allow public access to the employee’s or former employee’s social security number.” *Id.* § 552.024(a-1). Thus, a school district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5* (1989). Therefore, to the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employees at issue did not timely request confidentiality under section 552.024, the district may not withhold the information under section 552.117(a)(1).

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov’t Code* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c).

Therefore, the district must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

Section 552.147(a-1) of the Government Code provides, “The social security number of an employee of a school district in the custody of the district is confidential.” *Id.* § 552.147(a-1). Thus, section 552.147(a-1) makes the social security numbers of school district employees confidential, without such employees being required to first make a confidentiality election under section 552.024 of the Government Code. *Id.* § 552.024(a-1) (school district may not require employee or former employee of district to choose whether to allow public access to employee’s or former employee’s social security number). Reading sections 552.024(a-1) and 552.147(a-1) together, we conclude section 552.147(a-1) makes confidential the social security numbers of both current and former school district employees. Accordingly, the district must withhold the social security number of the district employee we have marked under section 552.147(a-1) of the Government Code.

In summary, to the extent the teacher at issue held a teaching certificate or permit under chapter 21 of the Education Code, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The district may withhold the information we have marked under section 552.107(1) of the Government Code. The district must withhold the date of birth we have marked under section 552.102(a) of the Government Code. To the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The district must withhold the social security number of the district employee we have marked under section 552.147(a-1) of the Government Code. The district must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long horizontal flourish extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 590055

Enc. Submitted documents

c: Requestor
(w/o enclosures)